The Environmental Hearings Office Handbook

An Introduction to the Hearing Process

Note to Readers:

The statutes, regulations (normally referred to as the Washington Administrative Code or WACs), ordinances, or court rules may have changed or been repealed since this handbook was written, or there may be new laws or rules that apply. There is no substitute for checking to make sure the sources of law you intend to rely on – for example, statutes, WACs, ordinances, regulations, court rules, and court decisions – have not been changed since you last looked at them.

It is recommended that you read this entire manual before you ask the Environmental Hearings Office specific questions about your appeal; many of your questions may be answered in the chapters of this handbook.

If after reading this manual you still have questions about your case, please feel free to contact the office. The office is willing to assist you with certain questions you may have regarding proper procedure. Employees of the office, Administrative Appeals Judges, and Board members cannot give legal advice, but please do not hesitate to call on us regarding a procedural matter.

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I. INTRODUCTION

Welcome to ***The Environmental Hearings Office Handbook*: *An Introduction to the Hearing Process***. The goal of this handook is to provide you with an overview of the hearing process so you can better present your case in an appeal. In this handbook you'll find:

- A brief summary of the Environmental Hearings Office (EHO), its functions and limitations;
- Pre-trial procedures;
- The hearing process; and
- Other available resources.

Overview of The Environmental Hearings Office

The Environmental Hearings Office is the umbrella state agency for two hearings Boards:

- The Pollution Control Hearings Board
- The Shorelines Hearings Board

The **Pollution Control Hearings Board** (PCHB) consists of three members appointed by the governor and confirmed by the state senate. One of the members must be an attorney and no more than two members can be from the same political party. All PCHB members must have experience or training in environmental matters. The Board hears appeals from orders and decisions of the Department of Ecology (Ecology), the regional air pollution control agencies, and certain decisions of other agencies, such as local health departments and the Washington State Department of Natural Resources (DNR).

A current listing of the Pollution Control Hearings Board members and their biographies can be found on the Board's web page at www.eho.wa.gov

The **Shorelines Hearings Board** (SHB) hears appeals of shoreline permit decisions and penalties issued by local governments and Ecology under the Shoreline Management Act. The Board also hears appeals of shoreline-related rule making. The Board hears some, but not all, appeals of Shoreline Master Programs (SMP), the local shoreline plans. Those SMP appeals that come before the Board are from counties or cities not required to, or opting to, plan under the Growth Management Act. The rest of the SMP appeals are heard by the appropriate Growth Management Hearings Board.

The six-member SHB consists of the three members of the Pollution Control Hearings Board, the state's Commissioner of Public Lands or designee, a representative from the Washington State Association of Counties, and a representative of the Association of Washington Cities. While there is a primary designee for the counties and cities, alternative designees sit in on hearings

when the primary designee is unavailable. In other words, the make-up of a particular shoreline Board may change from one case to the next. To find out who will be sitting on your particular case, you can contact the staff at the Environmental Hearings Office.

A current listing of the Shorelines Hearings Board members and their biographies can be found on the Board's web page at www.eho.wa.gov

The two Boards described above are separate from the agencies whose decisions are being reviewed. The purpose of these Boards is to provide an independent assessment of the agency decision where appeals have been taken. In this regard, Board members function as judges.

As judges, Board members make decisions based on the record produced at the hearing. While Board members may give some deference to the expertise of agency personnel, they will not give the agency decision any deference, but will review the facts of the matter as if the decision had not been made. This type of review is called a ***de novo*** scope of review.

The function of the various Boards is to provide an impartial, independent review process. As such, Board members generally cannot have contact regarding the case with one party outside the presence of the other involved parties. Such one-sided contact is commonly referred to as ***ex parte*** communication. Ex parte communication is allowed if the issue being addressed is purely procedural and does not address the merits of the case. Any discussion with a Board member outside the presence of all parties cannot involve the facts of the case or any legal argument you may want to make. As a party to the litigation, you must insure all communication between you and a Board member, regarding anything other than the governing procedures, also includes other parties. This is true for all forms of communication, including written correspondence. Copies of all correspondence must be sent to all parties involved, as well as to the judge.

In addition to the members of the two Boards, the Environmental Hearings Office also has several Administrative Appeals Judges (AAJs). Administrative Appeals Judges function similar to Board members in that they act as the Presiding Officer in cases assigned to them.

For more information on the role of the Presiding Officer see Chapter II: The Pre-Trial Process – Presiding Officer.

The same limitations of contact apply to the AAJs. While they do not vote on the ultimate outcome of any case, they are empowered to control the pre-trial processes and to make evidentiary rulings at the hearing. The AAJs also run the mediation and procedural assistance programs at the Environmental Hearings Office, discussed later in this handbook.

The Environmental Hearings Office also has several administrative staff. Given limitations on contact with judges, you most likely will work directly with these employees. The first person you are likely to encounter is the receptionist who answers the phone, greets guests, and generally can direct you to the right person. If you're having trouble accessing the web page, the receptionist can be of assistance. If you do not have direct access to the Internet, the receptionist can make arrangements for you to use a research computer in the EHO or refer you to a public computer at a local library. The second person you may encounter is likely to be the hearing coordinator and Board clerk who handles scheduling for all Boards. The hearing coordinator can put you in touch with one of the judges, mediators, or procedural assistance providers. The hearing coordinator can also help you reschedule hearings or conferences.

Now that you've had a brief introduction to the Boards, the next chapter focuses on the pre-trial process. The process described next is applicable to all hearings, regardless of which Board your appeal is before.

II. THE PRE-TRIAL PROCESS

Representing Yourself – Acting "Pro Se"

This handbook is designed to help you represent yourself before the various Boards, highlighting some of the tasks and issues you can expect to encounter. The legal term for representing yourself is ***"acting pro se"*** which means "acting for oneself." In short, a person acting pro se is acting without the aid and counsel of a lawyer. If you decide to represent yourself you may hear lawyers and Board members refer to you as "pro se."

Keep in mind that when representing yourself you will be held to the standards of a lawyer. The same rules applicable to attorneys practicing before the Board normally apply to you, as well. However, all Boards allow the Presiding Officer to waive the procedural rules (except for those which are jurisdictional) for pro se parties in order to avoid manifest injustice.

Before deciding to represent yourself, you should consider the following two points: *First*, the legal process is complex and difficult to understand. The party on the other side of your appeal probably will be represented by a lawyer. Without your own lawyer, you may be at a disadvantage. *Second*, you have a personal interest in the outcome of your case, which may deprive you of the objectivity you need to present your case effectively before the Board.

If you cannot afford an attorney, you might be able to find attorneys and organizations, such as legal aid societies, willing to represent you "***pro bono***," that is, free of charge.

Chapter IV of this handbook lists some of the resources available to help you find a lawyer.

Additionally, the Environmental Hearings Office can provide some level of procedural assistance. This does not include legal research or information to help you advocate for your position. Procedural assistance is basically assistance on how the appeal process works.

One of the most important messages of this handbook is that your chances of being satisfied with the hearing process may be better if you are represented by a competent lawyer than if you are representing yourself.

Filing an Appeal

An appeal, or petition for review (the name for an appeal to the Shorelines Hearings Board), is an adjudicative proceeding, which gives you an opportunity for a hearing before the Board. This is your opportunity for due process.

Filing a Timely Appeal with the Board

An appeal before the Board begins by filing a ***notice of appeal*** or ***petition for review*** with the appropriate Board at the Environmental Hearings Office and by serving a copy of the document on the agency whose decision is being appealed. The appealing party is called the ***appellant*** *(*or ***petitioner*** in the case of a shoreline petition).

For the Board to acquire jurisdiction, both filing and service must be accomplished within a set timeline. The rules for service are very specific and failure to follow them exactly can result in a dismissal of your case. Check the Washington Administrative Code (WAC) that applies to your appeal to ensure that you file it within the proper time requirements and that you serve copies on the correct people or entities.

The notice of appeal, or petition for review, must be filed with the appropriate Board within the legal deadline for appeal pertaining to that Board. Some of the decisions have a 30-day period, whereas Shoreline appeals[i] have a 21-day filing period. The time clock starts ticking on a specific date or event, as set forth in the statute. In some cases, the clock starts on the date that a copy of the order or decision you desire to appeal is sent to you in the United States mail, properly addressed, postage prepaid. In other cases, the time starts on the date the decision is made. In other cases the time starts on the date the appellant receives notice of the order. It is very important for you to know exactly which rules apply to your appeal. The Board's rule governing the computation of time determines how the appeal period is calculated. Failure to file within the time frame can result in the Board having no jurisdiction over your appeal and the appeal being dismissed.

An appeal is considered ***filed*** with the Board on the date the Board actually receives the notice of the appeal, not the date that the notice is mailed. Therefore, it is important that the notice arrive in the Board’s office before the deadline. Being even a day late or arriving after the office closes can result in a

dismissal. Upon receiving the notice of appeal, the Board will acknowledge receipt. The date stamped on the appeal notice will be ***prima facie*** (legally sufficient) evidence of the filing date.

Contents of the Notice of Appeal
The notice of appeal needs to contain the following:

- The name, mailing address, telephone number, and fax number (if available) of the appealing party, and of the representative or attorney, if any.

- Identification of the parties, by listing in the caption or otherwise. In every case, the agency (and/or local government in the case of a shoreline petition for review) whose decision is being appealed, and the person to whom the decision is directed are named as parties.

- A copy of the order or decision you are appealing, or a copy of the application if the order or decision followed an application. The decision you are appealing may be a regulatory order, a civil penalty, or a permit. You must include this official document with your appeal.

- A short and plain statement showing the grounds upon which the appealing party considers such order or decision to be unjust or unlawful.

- A clear and concise statement of facts upon which an appealing party relies to sustain his or her grounds for appeal.

- The relief sought, including the specific nature and extent. This means telling the Board what you are asking them to do.

- The signature of the appealing party, representative, or attorney. The signature of the representative or the appealing party certifies that the person who signed the document has read the notice of appeal and that it is consistent with Civil Rule 11.[ii]

Service of the Notice of Appeal
Service means that you have provided a copy of the document to the other parties in the case. Service is important because it assures that the opposing parties have actual notice that an appeal has been filed. Failure to serve a party or a specifically identified entity can result in a dismissal of your appeal. In all cases, be sure to check the relevant Revised Code of Washington (RCW) and WACs to determine the exact time period.

The following briefly describes service of the notice of appeal as applied to the various Boards:

Pollution Control Hearings Board
Within 30 days of the date that a copy of the agency's order or decision is mailed to the appellant, the appellant also will serve a copy of the notice of appeal on the agency whose order or decision is being appealed. Proof of service may be made by certificate or affidavit filed with the Board. A copy of the notice of appeal should also be served on all other persons named as parties to the appeal.

Shorelines Hearings Board
For a petition pertaining to a local government's final decision on a permit, the petitioner is required to serve a copy of the petition with the Department of Ecology, the Attorney General and the local government within seven days of filing the petition with the Board. The rules prescribe who to serve at the local government. Again, failure to properly serve these entities can result in a dismissal of your petition.

Within 15 days of the date of receipt of the petition for review described above, Ecology or the Attorney General may intervene in the case before the Board to protect the public interest and to insure compliance with Chapter 90.58 RCW. Nothing in WAC 461-08-345 – setting a 21-day limit on when Ecology or the Attorney General can directly file a petition for review – limits their right to intervene under this section in a Board proceeding.

When the petitioner is not the permit applicant, the petitioner will serve the permit applicant with a copy of the petition for review.

Presiding Officer

Once an appeal has been filed, the appeal will be assigned to a specific Board member or an Administrative Appeals Judge to preside over the case. This person's name will appear on the scheduling letter. The person assigned responsibility for the case is commonly referred to as the ***Presiding Officer***. Once a Presiding Officer has been assigned, all future filings with the Board should be addressed or directed to the attention of the Presiding Officer. Remember, however, that the Presiding Officer must avoid "ex parte" contact with the parties.

Initial Scheduling Letter

After your appeal has been filed, the Presiding Officer will send you a letter to notify you of the date of the pre-hearing conference. This letter usually is sent within seven to ten days of the appeal being filed. While this date varies based on the Presiding Officer's schedule, a pre-hearing conference normally is scheduled within a month of filing the appeal. The initial scheduling letter usually directs all parties, prior to the pre-hearing conference, to file and serve on the other parties their proposed legal issues, witness list, and exhibit list.

Filing means you have delivered a copy to the Board's office either by mail or in person. The date of filing is the date the Board receives the document. ***Service***

means that you provided a copy of the document to the other parties in the case. Service can either be by mail or by delivering the document in person. The filing of the legal issues and preliminary witness and exhibit lists prior to the pre-hearing conference helps the Board determine how complicated a particular appeal is and how long a hearing should be scheduled. The requirement to serve other parties will help the pre-hearing conference process be more efficient and will eliminate any ex parte communication.

The initial scheduling letter also may provide you the date of the actual hearing and usually provides important information regarding other services the Board has available to resolve the appeal. When you receive this letter, it is important for you to note all the dates***. Failure to comply with the instructions in the letter could result in your appeal rights being affected, including even the dismissal of your case.***

Conflicts with Scheduling

If you have a conflict on the pre-hearing date, you should contact all the other parties to see if they would agree to a continuance (change or delay) of the pre-hearing date. If they agree, you then can contact the hearing coordinator by telephone to obtain a new date for the pre-hearing conference. When the new date is established the hearing coordinator will send a confirmation letter to all parties.

If the parties don't agree to a continuance, you can file a motion for a continuance. If a motion for continuance is filed, it must be served on all the other parties. Once the other parties have had a chance to file a response, the Presiding Officer will rule on the motion.

If you have a conflict on the proposed hearing date indicated in the scheduling letter, you should advise the EHO hearings coordinator or advise the Presiding Officer at the pre-hearing conference of the nature of your conflict. If you have a conflict inform the EHO as soon as possible.

If you don't receive the initial scheduling letter, you should contact the receptionist to verify that the Board has an accurate mailing address for you. If a letter has gone out and you have not received it, the receptionist can send you a copy.

It is very important for you to always keep the Board and the other parties advised of how to get in touch with you. This is true even if you are going to be on vacation. You could receive important correspondence setting deadlines while you are gone. As a participant in this litigation, it is your responsibility to meet all deadlines or seek an appropriate continuance. If you have failed to keep the Board and other parties advised of how to contact you and you miss important deadlines, your appeal rights could be affected, including even the dismissal of your case.

Pre-Hearing Conference: Content & Deadlines

A pre-hearing conference is a meeting (by phone) with the Presiding Officer and all the parties to discuss the case, set the hearing schedule, and determine specific issues. One purpose of the pre-hearing conference is to identify the legal issues in the appeal and set deadlines for processing the appeal. The pre-hearing conference also can be used to meet the other parties and discuss potential settlement options.

Pre-hearing conferences typically are held by phone. IN the scheduling letter you will be provided the phone number and pin code for calling into the conference at the designated time.

The Presiding Officer usually will start the pre-hearing conference by ***taking appearances***. This is the opportunity for you to identify yourself and indicate whether you represent yourself or someone else. This also is the time to identify whether an attorney or someone else will represent you. After appearances have been taken, the Presiding Officer usually will inquire into efforts made, or the desire of the parties to explore settlement (described in more detail later). Next, the Presiding Officer will address the following issues:

- Identifying the legal issues in the case;
- Identifying the expected number of witnesses;
- Scheduling the hearing date and/or dates;
- Scheduling the hearing location;
- Scheduling when final witness and exhibit lists must be filed with the Board and served on the other parties;
- Scheduling any motion deadlines;
- Scheduling any trial brief deadlines;
- Scheduling any discovery deadlines; and
- Any other matters deemed important by the parties and Presiding Officer.

Your obligations actually start well before the pre-hearing conference. As noted previously, you will be asked to file a list of legal issues and a proposed witness and exhibit list before the conference. In preparing this document, you need to spend some time thinking about and researching your case so your issues and evidence are appropriately identified. For example, it isn't enough to simply say that the agency's decision was wrong. You need to state why you believe the agency decision was wrong. Once you have figured out why you believe the agency decision was wrong, you should think about how you would frame that into an issue or issues in a step-by-step manner. It may be helpful to think about how you would frame an issue into a question or series of basic questions. By the time of the hearing, you will need to produce evidence or testimony to back up your beliefs or positions. Backing up your beliefs or positions also is called ***presenting evidence*** to prove your issues.

In addition to the identification and scheduling that occurs at the pre-hearing conference, the conference also can be a great opportunity for you to ask any questions regarding the process.

It is important for you to review carefully any correspondence you receive from the Board and follow any instructions you are given. Failure to do so has the potential to affect your appeal rights. At a minimum, it is disrespectful to the process and other parties involved. Presiding Officers usually understand the fact that litigation is a new and different action for most people representing themselves. However, it is important for you to do your part by being prepared and following the Board's directions. If you don't understand those directions, you should seek clarification before deadlines are missed.

Settlement/Mediation

Up to this point, discussion has focused on how to proceed if the case goes to trial or is litigated. Sometimes the parties decide they would prefer to try and settle their disputes rather than risk an unknown or unpredictable outcome through the litigation process. Settlement of your case may be a preferred result, depending on the type of case and if the other party is amiable to settlement. In settlement, you control the result. If the case is litigated, the Board ultimately will control the outcome after hearing from all parties. Only you can decide whether settlement makes sense for you.

If you decide to try and settle your case, it can occur in different ways. Many parties reach agreement simply by negotiating with each other. However, some parties need assistance from a third-party mediator. A mediator can sometimes help the parties communicate with each other better by providing a non-emotional environment in which to discuss the issues. A mediator also can sometimes help the parties reach settlement by seeing the common ground the parties themselves are missing. Lastly, a mediator is sometimes helpful in making a party feel less intimidated by negotiating directly with attorneys who represent the other side. The Environmental Hearings Office does have mediators available to assist you without charge. If you would like to participate in mediation, you simply need to tell the Presiding Officer of your desire. The Presiding Officer will make a referral to the mediator on your behalf. If the other parties to the case are agreeable to try mediation, the mediator will set up a time and place for the parties to meet.

Legal Issues

It is sometimes difficult to separate what is a broad issue from what is an argument to support the issue. It usually is preferable to have the issues framed broadly so you won't be limited in making arguments to support the issues. When identifying your legal issues, think broadly about why you disagree with the decision you have appealed and what arguments support your position. But remember, a legal issue does not include the arguments.

For instance, you might want to think about whether you disagree a violation has occurred or whether you disagree with specific facts as alleged. Do you think the permit was wrongly denied and, if so, why? If the facts are in dispute but you agree a violation did occur, why is the disagreement in the facts important? By thinking through these issues, you hopefully will be able to frame specific but broadly stated issues prior to the pre-hearing conference.

To frame an issue and to separate issues from arguments, it is sometimes helpful to start your issue with the word “Did” and then frame the remaining question.

Once you have identified your issues, you need to think about what evidence would help prove each of them. Evidence is testimony from a witness or a document admitted as an exhibit. Evidence is not an argument on the law. While you will be given an opportunity during the hearing to make legal arguments, for purposes of the pre-hearing conference you should focus on the evidence you will need to present. By focusing on the evidence, you should be able to readily identify which witnesses you will call and which documents support your case.

The Procedural Assistance Program was started to help people like you be better prepared to participate in the litigation before the various Boards. It is not a substitute for legal advice. Every party has a right to be represented by an attorney before the Boards. If you want an attorney, you will need to obtain one yourself. You don’t, however, have to have an attorney to appear before the Boards. Only you can make the decision of whether an attorney is needed or not. If you have legal questions you want answered, you will need to obtain your own attorney or do your own legal research. The Procedural Assistance Officer will not be able to answer legal questions for you – this includes any requests for an overall evaluation concerning whether you have a winnable case or not. At the end of this handbook, resources are listed in Chapter IV to help you locate an attorney.

Discovery and Dispositive Motions

After the legal issues have been identified, the Presiding Officer will set other pre-trial deadlines. Two of these deadlines require further explanation: ***discovery*** and ***dispositive motions***.

Discovery is a term used to describe the formal exchange of information prior to the hearing. Contrary to the version of the law portrayed on television, full and open exchange of information in advance of the hearing is required. In other words, there should be little or no surprise at the hearing. Each party has a right to know what the other party’s evidence will be at the hearing and this means having access to it before the hearing. Discovery is the mechanism for acquiring information from the other party. The four most commonly used methods of discovery are:

- Interrogatories, which are written questions required to be answered within a specified time frame.
- Requests for admissions, which are statements you are required to admit or deny within a specified time frame.
- Production of documents, which is a request to produce relevant documents.
- Depositions, which are proceedings where witnesses are sworn in by a court reporter and answer questions posed by the other side.

Before seeking information from the other side prior to the hearing, you may want to see examples of discovery contained in the formbook at the Environmental Hearings Office.

Some parties agree to proceed with informal discovery rather than formal discovery. Informal discovery simply means that the parties will work out the exchange of information between themselves without having a formal deadline set by the Presiding Officer and without proceeding under the Superior Court Civil Rules[iii]. The Presiding Officer will explore what the parties' preferences are at the pre-hearing conference. To proceed with informal discovery, all parties must agree. You should ask any questions you have about discovery at the pre-hearing conference or ask the Procedural Assistance Officer.

At the pre-hearing conference, the Presiding Officer also will set briefing deadlines for ***dispositive motions***. A motion is a request filed by one of the parties asking the Board or the Presiding Officer to rule on a particular issue. Dispositive motions attempt to resolve the legal issues in a case in advance, and sometimes, in lieu of a hearing. Sometimes a dispositive motion can fully resolve the case and sometimes these motions are used to narrow the issues. Generally, for a party to prevail on a summary judgment dispositive motion, it must prove that there are no material facts in dispute and that its interpretation of the law is the correct interpretation.

Pre-Hearing Order

After the pre-hearing conference has been held, the Presiding Officer will send you a copy of the Pre-Hearing Order. This Order will reflect the dates agreed to in the pre-hearing conference and will provide additional instructions. You should read this Order carefully and note all the instructions. You should particularly note all of the relevant dates on your calendar. It also is important to note the number of copies of documents you are required to submit and allow sufficient time to make the copies. If you have questions about any of the instructions, contact the Presiding Officer to seek clarification of the procedures. Full compliance with the Pre-Hearing Order is important. ***Failure to comply may result in your appeal rights being affected, including the potential for your appeal to be dismissed.***

III. TRIAL PREPARATION AND TRIAL

Trial preparation actually started when you prepared for the pre-hearing conference. At that point you identified the legal issues, preliminary witnesses and exhibits. Since then, you have participated in either formal or informal discovery where both parties shared information about their case. These activities also are trial preparation activities. After completing these activities, you probably will have more information available to you than you will want to present at the hearing. It is important for you to try and keep the presentation as simple as possible. Otherwise, it may be difficult for Board members to fully follow your arguments. Really think about the key points you want to make. If a point is minor and would not affect the outcome or arguments, it may not be worth presenting at the hearing.

Sometimes, it is helpful to think about the theme of the case you want to present. For example, do you think you were treated unfairly, or do you think a violation did not occur? Perhaps your theme is that the permit should have been granted or the conditions imposed were wrong. Whatever your theme, you should evaluate each piece of evidence to decide whether it really addresses your concern. If not, it may be more confusing to the Board than helpful.

Your Pre-Hearing Order will tell you where the hearing is to be held. The Board may travel to a location near where the majority of witnesses are located or where the property at issue is located. If the Board travels, the hearing room often is a local library conference room or some other public facility. The Board also holds hearings at the Environmental Hearings Office in Lacey, Washington. Directions to this office can be found on the office's web page.

Evidence – Telling Your Story

Who goes first at the hearing depends on the type of hearing. If the case is about a penalty or is another type of enforcement case, the agency usually goes first and has the burden of proof. If the case deals with the issuance or non-issuance of a permit, the appellant would go first and would have the burden of proof. Burden of proof means the duty of producing evidence sufficient to persuade the Board of the rightness of the case.

Each case will be different so only you can decide what evidence is important to present and what is not. The goal is to tell your story to the Board. What evidence would best paint the picture you are trying to show? In answering this question, you may find it helpful to review the legal issues identified in the Pre-Hearing Order. For example, if an issue is the reasonableness of a penalty, you would want to present evidence that supports a lower penalty. By way of further example, if knowledge of the property is key, you may want to consider presenting maps, site plans, or photographs as evidence. By looking at the legal

issues and thinking about the proof needed for each issue, you should be able to identify the evidence you need.

There is no one way to organize your documents. For example, some people want to tell their story chronologically and organize their exhibits in chronological order. Some people have discrete arguments they want to make. In that case, you may want to organize your exhibits to correspond to each argument.

After you have figured out the logical sequence for presenting your evidence and have organized your exhibits accordingly, you need to prepare an exhibit list. An exhibit list simply is a list of all of the documents you intend to present. For example, if you have been issued a penalty order and plan on submitting that order as an exhibit, you would list the date the order was issued, the name of the document and which exhibit number you are going to give that document. If you're the appellant, you would label your documents A-1, A-2, A-3, etc. If you're the respondent, you would label your documents R-1, R-2, R-3, etc. You should label each document as a separate exhibit. The Pre-Hearing Order will direct when you are required to file the exhibit list with the Board and serve the other parties.

Once you have labeled the exhibits, you will need to have copies made and the exhibits collated. The Pre-Hearing Order will direct you to bring an original and a specific number of copies of the exhibits to the hearing. It is important that your documents be organized and that you bring the required number of copies to the hearing as directed. The original is filed in the Board's file and becomes the official set of the exhibits. The copies are provided to each Board member and the Presiding Officer as their working copies. If the exhibits are disorganized or not collated when they are presented to Board members, it may be difficult for them to follow the evidence and will take valuable hearing time while the exhibits are organized and/or distributed. In the past, Boards have found it most helpful when exhibits are submitted in three-ring binders with tabs showing the exhibit number. If the exhibits are in binders, Board members can easily locate and review an exhibit when referenced by a witness. If Board members have to fumble with loose pages that are not in any particular order, they may miss either the exhibit reference or testimony by the witness.

In addition to being disorganized, a common mistake made by non-lawyers is the presentation of redundant or duplicative evidence. It is important to remember each Board member has specialized knowledge in the area under litigation. Board members do not need to have evidence repeated in order for them to understand the issue. Once you have made your point on a subject, it is important for you to move on. Otherwise, your evidence becomes redundant and its effectiveness is actually reduced.

Witnesses

To get witnesses to come to the hearing, usually all you need to do is ask them to testify, especially if the witness is a friend or neighbor. If the witness is an agency employee who hasn't been identified by the agency, or someone who is hostile to you or your case, you may need to have a subpoena issued by the Presiding Officer to require that person's attendance. You should advise the Presiding Officer of the need to issue a subpoena at least a month before the hearing, or as soon as you know who you plan on calling for witnesses.

In preparing for witness testimony, first decide the order in which you plan to call your witnesses. In thinking about this, don't forget to include yourself if you intend to offer evidence. Remember, evidence is related to something that occurred, was observed, etc. It is not legal argument about why you should win.

Once you have determined the order of the witnesses, prepare a list of questions pertaining to things you want each witness to cover. The goal of witness questioning is to paint a picture of facts for the Board so the members can understand your points. If your case becomes too complex or confusing, or if the questions jump from one subject to the next, the Board may not be able to follow your argument. You want to present the evidence in a logical and understandable format.

If you call yourself as a witness, you will not be able to ask yourself questions. Usually, parties who also are witnesses are allowed to present their testimony in a narrative format. In preparing your own testimony you are permitted to rely on written notes, so it's a good idea to outline or write out all the points you want to make. One word of caution is that it is common for parties to confuse argument with facts. Throughout the course of a hearing, you as your representative may make many points either through your opening statement, closing argument, or through your questions. None of these presentations are evidence. For the Board to consider ***factual evidence***, it needs to come in through ***sworn testimony from a witness***. Simply because you may have made statements in the opening or closing does not mean the Board can consider those statements as evidence. It is very important for you to present evidence as well as argument. That is why preparing your own testimony prior to the hearing is so critical.

You will be able to cross-examine witnesses called by the other side. You need to write questions for each witness the other side is calling. Remember, very few cases can be won on cross-examination alone. Usually, your case will be won based on the strength of your evidence and not the weakness of the other side. Normally, you would want to make only a few points on cross-examination with each witness. In analyzing the points you want to make, it is helpful to review the exhibits you plan on submitting.

Opening Statements

The hearing usually starts with the Presiding Officer talking with the parties prior to the hearing to find out which exhibits are stipulated to and which ones have objections. The Presiding Officer also may ask if there are any preliminary matters either party wants to raise. Once the Presiding Officer has dealt with the preliminary issues, the formal hearing typically commences by the Presiding Officer officially opening the record and taking appearances from the parties. Once appearances have been taken care of, the parties' opening statements are next.

An opening statement is a chance for you to summarize the facts you believe the evidence will show. Think of it as the box to a jigsaw puzzle; the evidence consists of the various pieces of the puzzle. Standing alone, each piece may not make sense. However, if you have the picture on the box for the puzzle, you can see how each piece fits. An opening statement is the presentation of the "box." In your opening, you paint the picture you expect the evidence will show so that when each piece of evidence comes in, the Board has some context of how it fits together with other pieces of evidence. The opening statement is not in itself evidence. That evidence will be in the form of admitted documents and sworn testimony from witnesses.

Questioning: Direct and Cross Examination

After the opening statement, the party that has the burden of proof identifies its first witness, who is called to the stand and sworn in. At that time a question and answer format follows. After the witness has been examined (questioned) by the person who called the witness, the other side has a chance to ask questions (cross-examination). Once that has been done, the first party can ask additional questions (re-direct examination). However, this second set of questions is limited to only those subjects the witness was asked on cross-examination. At the conclusion, the Board members may have questions. If that happens, the Presiding Officer usually will allow the parties to ask questions that are directly related to the Board's questions. Each witness is treated the same until the party with the burden of proof rests his or her case. At that time, the other party calls their witnesses and the same format is used.

Closing Statement

The closing argument comes after all the witnesses are finished. The closing argument is the time to argue both the facts and the law to Board members. It is the opportunity to tie everything together in one nice bundle and to tell the Board exactly what relief you want. Do you want the Board to reverse the agency decision, modify a penalty, remove a condition, etc.? This is your chance to tell the Board why you think you should win.

Board's Decision

When closing is finished, the Board members need time to meet and discuss the case. When it is a Board with several members, it is difficult for them to rule

immediately following the hearing. The members like to take more time to fully review the exhibits and arguments presented at the hearing. Usually, the Board will issue a written ruling some time after the hearing has concluded. The Presiding Officer will advise the parties at the conclusion of the case as to when they can expect an opinion. The opinion will be mailed to the parties, with instructions on how to further appeal the ruling if it is unfavorable to them.

Judicial Review (Appeal)

If you believe the Board decided your case incorrectly, in most cases you have the right to have the Superior Court review the Board's decision or you can ask the Board to reconsider its decision. If you decide to ask the Board to reconsider its decision you must file a petition with the Board for reconsideration within ten days of the date of the Board's Order. If you decide to ask for review by the Superior Court you must file an appeal within 30 days from the date of the Board's final order. Be sure to check the relevant RCWs and WACs for specific details.

IV. OTHER RESOURCES

Where to Find a Lawyer

Call the County Bar Association in your county or the Washington State Bar Association in Seattle for information about referral to a lawyer.

Legal Resources

- Library at the Environmental Hearings Office
- Law Schools: University of Washington Law School (Condon Hall), Seattle University School of Law, and Gonzaga University School of Law
- County Law Libraries: King County, Snohomish County
- Washington State Law Library (Temple of Justice)
- Washington Lawyers Practice Manual contains forms and information about Washington law. The manual is designed for lawyers; however, you may find the information helpful. You should note, the information contained may not always be up to date.
- Internet resources are available through the EHO homepage at www.eho.wa.gov

V. FORMS

Commonly Used Forms

Appeal Forms

- Pollution Control Hearings Board
- Shorelines Hearings Board

Declaration of Service Form
Scheduling Letter

Pre-Hearing Order
Joint Status Report Regarding Settlement Form
Motion for Continuance (and Proposed Order)
Preliminary List of Legal Issues, Witnesses, and Exhibits
Final Witness List Form
Final Exhibit List Form
Interrogatories Form
Request for Admissions Form
Request for Production Form
Notice of Deposition Upon Oral Examination Form
Motion for Summary Judgment and Proposed Order (Dispositive Motion)
Declaration In Support of Motion Form
Response to Motion for Summary Judgment
Reply to Response to Motion for Summary Judgment
Hearing Subpoena Form (Witness)
Pre-Hearing Brief
Opening Statement
Direct Examination: List of Sample Questions
Cross Examination: List of Sample Questions
Closing Statement
Board Decision
Petition for Reconsideration
Petition for Judicial Review

Other Forms

Petition for Rule Making (PCHB)
Petition for Review (SHB)
Petition for Rescission of Shoreline Permit (SHB)
Petition for Review of Penalty Order (SHB)
Petition for Declaratory Ruling (SHB)*
Petition for Rule Making (SHB)
Motion For Protection Order Form
Motion to Compel Discovery Form
Motion to Dismiss
Motion to Intervene
Motion for an Extension of Time to File Briefs
Motion for Filing Over-Length Briefs

APPENDIX A: LEGAL RESEARCH

An Overview

It is not the purpose of this chapter to teach the pro se litigant all the intricacies of legal research and writing, or to sort out the complexities of applying statutory or case law to the facts of a particular case. In fact, the law prohibits personnel employed by the Board, including its Judges, from providing information

regarding the application of the law to the facts of any case. Instead, the information provided here is a guideline for conducting your own research.

Just as there are certain standards of procedure for filing documents with the Board, there are certain standards for citing authority when applying the law to the facts of a certain case. The most common source people turn to in determining how to write correct citations is *A Uniform System of Citation*, (Sixteenth Edition), published and distributed by The Harvard Law Review Association, Cambridge, Massachusetts. It is more commonly referred to as "The Bluebook" and sometimes as "The Harvard Citator." All the information required for proper citation format can be found in this one book, available in most law libraries.

Authority is the information used by a party to persuade a Court to find in favor of that party's side. Legal authority is divided into two classes -- primary and secondary.

Primary Authority

Primary authority is the most accepted form of authority cited and should be used before any other authority. There are two sources of primary authority: "statutory authority" and "case authority." Statutory authority consists of constitutions, codes, statutes and ordinances of the United States, the individual states, counties, or municipalities. Case authority is comprised of court decisions, preferably from the same jurisdiction where the case is filed. When a judge decides a particular case, it becomes "precedent," which means that it becomes an example or authority to be used at a later time for an identical or similar case, or where a similar question of law exists.

Court decisions are published in what is called the National Reporter System, which covers cases decided by the United States Supreme Court, the Courts of Appeals, and the District Courts. ***Digest systems*** gather case decisions by subject matter on various points of law. There are many reporters in this system and they can be found in most law libraries. For example, there are digests that contain numerous cases dealing with the subject of civil rights, which may be consulted by a person who has brought a civil rights action in federal court.

In conducting research, try to find cases that already have been decided (precedent) which support the position you are taking in your case.

Secondary Authority

Secondary authority is found in legal encyclopedias, legal texts, treatises, and law review articles. It should not be cited except where no primary authority can be located by the party conducting the research. Secondary authority also can be used to obtain a broad view of the area of law and also as a tool for finding primary authority.

There are various types of secondary authority, including:

- *Legal encyclopedias,* which contain detailed information about various topics.
- *Treatises* are texts written about a certain topic of law by an expert in the field.
- *Law review articles* are published by most accredited law schools and sometimes provide a broad overview of a particular subject matter.
- The *Index to Legal Periodicals* provides reviews of books in the law, as well as comments regarding cases listed in the "Table of Cases."
- *American Law Reports Annotated* (A.L.R.) is a collection of cases on more narrow issues of law. Be aware that A.L.R. is updated frequently.
- *Restatements* are publications compiled from statutes and decisions, which discuss the law of a particular field.
- *Shepard's Citations* is a large set of law books that provides a means by which any reported case (a cited decision) may be checked to see when and how another court (the citing decision) has referred to or interpreted the first decision.

All cases should be checked to make sure another court has not reversed or overruled your cited decision.

Basic Rules for Conducting Legal Research

- Give priority to cases from your own jurisdiction (i.e., State Court Decisions and Board Decisions).
- Search for the most recent ruling on a subject matter.
- Check to see if your book has a “pocket part,” if so, use it to obtain current authority for your lawsuit.
- Be aware of "2d" and "3d" volumes. They distinguish one series from another. Cases that appear in "3d" volumes are more recent than those appearing in the "2d" series.
- All legal citations are written with the volume number first, an abbreviation of the Reporter's name, and the page number (*e.g.*, 68 Wash.2d 75; 21 Wn. App. 517 or 144 A.L.R. 422).
- ***Shepardizing*** your citations helps you avoid relying on overruled cases. Shepardizing refers to a large set of law books entitled *Shepard’s Citations* that provides a means by which the status of any reported case may be checked to see if another court has referred to, interpreted, or overruled the original decision in that case.

As stated earlier, the above information is not meant to be a complete or comprehensive guide to the law library or to legal research and writing, but is to be used as a guide to help you get started.

Glossary

Adjudicative Proceeding: a hearing before the board.

De Novo Scope of Review: a new review of the facts of the matter as if a previous decision had not been made.

Discovery: a term used to describe the formal exchange of information prior to the hearing; e.g., interrogatories, request for admissions, production of documents, or depositions.

Dispositive Motion: a motion that disposes of an appeal; e.g., Motion for Summary Judgment.

Ex Parte Communication: a one-sided contact made with a board member outside the presence of the other involved parties.

Jurisdictional: within the authority of the Board.

Manifest Injustice: an obvious violation of what is right; or a person's rights.

Pocket Part: the section in the back of a legal reference book that contains the most recent updates to the referenced material.

Prima facie: at first view; on its face; e.g., the date stamped on the appeal notice will be ***prima facie*** (legally sufficient) evidence of the filing date.

Pro Bono: representation by an attorney, free of charge.

Pro Se: acting for oneself, without the aid and counsel of an attorney.

Stare Decisis: the policy of courts to stand by precedent.

Summary Judgment: judgment rendered by the court in response to a motion, proving there are no material facts in dispute and that its interpretation of the law is the correct interpretation.

End Notes

[i] The deadline for filing a petition for review with the Shorelines Hearings Board is twenty-one days from the date the permit decision was filed with the Department of Ecology; or in the case of a shoreline variance or conditional use permit decision by Ecology, twenty-one days from the date Ecology transmits its decision to the local government and the applicant. However, the deadline for the filing of petitions for review of shoreline regulatory orders and penalties, issued by Ecology, remains the standard thirty days applicable to all other appeals before the Boards. If the last day of the appeal falls on a Saturday or Sunday or state holiday, that day is not counted. Rather, the last day would fall on the next business day after the Saturday, Sunday, or holiday.

[ii] The Boards typically apply these court rules when there is an evidentiary dispute. However, the Boards, as state administrative agencies, may apply a more liberal rule regarding the admissibility of out-of-court statements also known as hearsay.